

AMENDED IN SENATE APRIL 12, 2011

AMENDED IN SENATE MARCH 21, 2011

SENATE BILL

No. 475

Introduced by Senators Wright and Emmerson

February 17, 2011

An act to amend Sections 5956, 5956.1, 5956.2, 5956.3, 5956.4, 5956.5, 5956.6, 5956.7, 5956.8, 5956.9, and 5956.10 of, and to add Sections ~~5956.12 and 5956.13~~ *Section 5956.12* to, the Government Code, relating to infrastructure financing.

LEGISLATIVE COUNSEL'S DIGEST

SB 475, as amended, Wright. Infrastructure financing.

Existing law authorizes a governmental agency, as defined, to solicit proposals and enter into agreements with private entities for the design, construction, or reconstruction by, and lease to, private entities, for specified types of fee-producing infrastructure projects. Existing law permits these agreements to provide for infrastructure facilities owned by a governmental entity, but constructed by a private entity, to be leased to or owned by that private entity for a period of up to 35 years.

This bill would authorize a local governmental agency to enter into an agreement with a private entity for financing for specified types of revenue-generating infrastructure projects. The bill would require an agreement entered into under these provisions to include adequate financial resources to perform the agreement, and would permit the agreements to lease or license to, or provide other permitted uses by, the private entity for a term of up to 50 years, after which time the project would revert to the governmental agency.

Vote: majority. Appropriation: no. Fiscal committee: no.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 5956 of the Government Code is amended
2 to read:

3 5956. Local governmental agencies have experienced a
4 significant decrease in available tax revenues to fund necessary
5 infrastructure improvements. If local governmental agencies are
6 going to maintain the quality of life that infrastructure provides,
7 they must find new funding sources. One source of new money is
8 private sector financing utilized to study, plan, design, develop,
9 finance, construct, maintain, improve, rebuild, repair, operate, or
10 any combination thereof, infrastructure facilities. Infrastructure
11 projects may be financed by a combination of public funding and
12 private sector financing under this chapter. Private sector financing
13 for an infrastructure project under this chapter may include, but is
14 not limited to, cash, cash equivalents, loans, debt assumption,
15 letters of credit, capital investment, in-kind contributions of
16 materials or equipment, construction or equipment financing,
17 carrying of costs during construction, or any combination thereof.
18 Unless private sector financing becomes available to study, plan,
19 design, develop, finance, construct, maintain, improve, rebuild,
20 repair, or any combination thereof, fee-producing infrastructure
21 facilities, some local governmental agencies will be unable to
22 replace deteriorating infrastructure. Further, some local
23 governmental agencies will be unable to expand and build new
24 infrastructure facilities to serve an increasing population.

25 SEC. 2. Section 5956.1 of the Government Code is amended
26 to read:

27 5956.1. It is the intent of the Legislature that local governmental
28 agencies have the authority and flexibility to utilize private sector
29 financing or public financing, and any combination of these
30 financing sources, to study, plan, design, construct, develop,
31 finance, maintain, rebuild, improve, repair, or operate, or any
32 combination thereof, fee-producing infrastructure facilities.
33 Without the ability to utilize these sources of financing to study,
34 plan, design, construct, develop, finance, maintain, rebuild,
35 improve, repair, or operate, or any combination thereof,
36 fee-producing infrastructure facilities, the Legislature finds that
37 some local governmental agencies will not be able to adequately,
38 competently, or satisfactorily retrofit, reconstruct, repair, or replace

1 existing infrastructure and will not be able to adequately,
2 competently, or satisfactorily design and construct new
3 infrastructure.

4 SEC. 3. Section 5956.2 of the Government Code is amended
5 to read:

6 5956.2. It is the intent of the Legislature that this chapter be
7 construed as creating a new and independent authority for local
8 governmental agencies to utilize private sector financing or public
9 financing, and any combination of these financing sources, to
10 study, plan, design, construct, develop, finance, maintain, rebuild,
11 improve, repair, or operate, or any combination thereof,
12 fee-producing infrastructure facilities. To that end, this authority
13 is intended to supplement and be independent of any existing
14 authority and does not limit, replace, or detract from existing
15 authority. This chapter may be used by local governmental entities
16 when they deem it appropriate in the exercise of their discretion.
17 It is the intent of the Legislature that this act create no new
18 governmental entities.

19 SEC. 4. Section 5956.3 of the Government Code is amended
20 to read:

21 5956.3. For purposes of this chapter, the following definitions
22 shall apply:

23 (a) “Fee-producing infrastructure project” or “fee-producing
24 infrastructure facility” means the operation of the infrastructure
25 project or facility will be paid for, in whole or in part, by the
26 persons or entities benefited by or utilizing the project or facility.

27 (b) “Governmental agency” includes a city, county, city and
28 county, including a charter city or county, school district,
29 community college district, public district, county board of
30 education, joint powers authority, transportation commission or
31 authority, or any other public or municipal corporation.

32 (c) “Private entity” includes a person, business entity,
33 combination of persons and business entities, or a combination of
34 business entities.

35 SEC. 5. Section 5956.4 of the Government Code is amended
36 to read:

37 5956.4. A governmental agency may solicit proposals and enter
38 into agreements as authorized under this chapter for the following
39 types of fee-producing infrastructure projects:

40 (a) Irrigation.

- 1 (b) Drainage and sanitary sewer systems.
- 2 (c) Energy or power production.
- 3 (d) Water supply, treatment, and distribution.
- 4 (e) Flood control.
- 5 (f) Inland waterways.
- 6 (g) Harbors.
- 7 (h) Municipal improvements.
- 8 (i) Commuter and light rail.
- 9 (j) Highways or bridges.
- 10 (k) Tunnels.
- 11 (l) Airports and runways.
- 12 (m) Purification of water.
- 13 (n) Sewage treatment, disposal, and water recycling.
- 14 (o) Refuse disposal.
- 15 (p) Structures or buildings, except structures or buildings that
- 16 are to be utilized primarily for sporting or entertainment events.

17 SEC. 6. Section 5956.5 of the Government Code is amended
18 to read:

19 5956.5. Notwithstanding Chapter 10 (commencing with Section
20 4525) of Division 5, or Part 2 (commencing with Section 10100)
21 or Part 3 (commencing with Section 20100) of Division 2 of the
22 Public Contract Code, the governmental agency soliciting proposals
23 and entering into agreements with private entities for the studying,
24 planning, design, developing, financing, construction, maintenance,
25 rebuilding, improvement, repair, or operation, or any combination
26 thereof, by private entities for fee-producing infrastructure projects
27 shall ensure that the contractor is selected pursuant to a competitive
28 negotiation process. Projects may be proposed by the private entity
29 and selected by the governmental agency at the discretion of the
30 governmental agency. Projects may be proposed and selected
31 individually or as part of a related or larger project. The competitive
32 negotiation process shall ~~utilize, as a primary selection criterion,~~
33 ~~the demonstrated competence and qualifications of the private~~
34 ~~entity to perform the services required under the agreement,~~
35 ~~including prior experience in performing similar services. The~~
36 *utilize criteria that the governmental agency identifies in the*
37 *solicitation documents that must include the following factors*
38 *applicable to the proposed project: financial or price proposal or*
39 *approach that features, life cycle-costs, technical approach, an*
40 *acceptable safety record, experience and qualifications of the*

1 *private entity to perform the services under the agreement, and*
2 *any other criteria specifically identified by the governmental*
3 *agency. The selection criteria shall also ensure that the facility be*
4 *operated at fair and reasonable prices to the user of the*
5 *infrastructure facility services. The competitive negotiation process*
6 *shall not require competitive bidding. The competitive negotiation*
7 *process shall specifically prohibit practices that may result in*
8 *unlawful activity including, but not limited to, rebates, kickbacks,*
9 *or other unlawful consideration, and shall specifically prohibit*
10 *governmental agency employees from participating in the selection*
11 *process when those employees have a relationship with a person*
12 *or business entity seeking a contract under this section that would*
13 *subject those employees to the prohibition of Section 87100. Other*
14 *than these criteria and applicable provisions related to providing*
15 *security for any required construction and completion of the*
16 *facility, the governmental agency soliciting proposals is not subject*
17 *to any other provisions of the Public Contract Code, this code, or*
18 *any other statutory provision that relates to public procurements.*

19 SEC. 7. Section 5956.6 of the Government Code is amended
20 to read:

21 5956.6. (a) For purposes of facilitating projects, the agreements
22 specified in Section 5956.4 may include provisions for the lease,
23 license, or other permissive use of rights-of-way in, and airspace
24 over, property owned by a governmental agency, for the granting
25 of necessary easements, and for the issuance of permits or other
26 authorizations to enable the private entity to construct, maintain,
27 rebuild, improve, or repair infrastructure facilities supplemental
28 to existing government-owned facilities. Infrastructure constructed
29 by a private entity pursuant to this chapter shall, at all times, be
30 owned by a governmental agency. All public works constructed
31 pursuant to this section shall comply with Chapter 1 (commencing
32 with Section 1720) of Part 7 of Division 2 of the Labor Code. The
33 agreement may provide for the lease or license of those facilities
34 to, or their other permissive use by, the private entity for up to 50
35 years. In consideration therefor, the agreement shall provide for
36 complete reversion of the privately constructed facility to the
37 governmental agency at the expiration of the lease, license, or
38 other permissive use at no charge to the governmental agency.
39 Subsequent to the expiration of the period of the lease, license, or
40 other permissive use, the governmental agency may continue to

1 charge fees for use of the infrastructure facility. If, after the
2 expiration of the period of the lease, license, or other permissive
3 use, the governmental agency continues to lease airspace rights to
4 the private entity, it shall do so at fair market value.

5 (b) The agreement between the governmental agency and the
6 private entity shall include, but need not be limited to, provisions
7 to ensure the following:

8 (1) Compliance with the California Environmental Quality Act
9 (Division 13 (commencing with Section 21000) of the Public
10 Resources Code). Neither the act of selecting a proposed project
11 or a private entity, nor the execution of an agreement with a private
12 entity, shall require prior compliance with the act. However,
13 appropriate compliance with the act shall thereafter occur before
14 project development commences.

15 (2) Security for the performance of the agreement and
16 contractual provisions that are necessary to protect the funding
17 and financial terms of the agreement.

18 (3) Adequate financial resources of the private entity to perform
19 the agreement.

20 (4) Authority for the governmental agency to impose user fees,
21 in whole or in part, for use of the facility in an amount sufficient
22 to protect the revenue streams necessary for projects or facilities
23 undertaken pursuant to this chapter. User fee revenues, used in
24 whole or in part, may be paid to the governmental agency or the
25 private entity and shall be dedicated exclusively to payment of *all*
26 *of the following costs relating to the facility, including, but not*
27 *limited to*, the private entity's and the governmental agency's direct
28 and indirect capital outlay costs for the project, direct and indirect
29 costs associated with financing of the facility, including interest,
30 principal, repayment, issuance, and refinancing costs, direct and
31 indirect costs associated with operations, direct and indirect user
32 fee collection costs, direct and indirect costs of administration of
33 the facility, direct and indirect costs of maintenance, *and* other
34 project-related costs,—*and including* a reasonable return *on*
35 *investment* to the private entity as set forth specifically in the
36 agreement, or included as part of the costs and fees, as negotiated
37 or determined during the procurement process.

38 (5) As a precondition to the imposition or increase of a user fee,
39 the governmental agency shall conduct at least two public hearings
40 at which public testimony will be received regarding a proposed

1 user fee revenue or increase in user fee revenues. The public
2 hearings shall precede the action by the governmental agency to
3 actually impose a user fee or to increase an existing user fee. The
4 governmental agency shall consider the public testimony prior to
5 imposing a new or increased user fee. The governmental agency
6 shall provide the following notices and utilize the following
7 procedures:

8 (A) Notice of the date, time, and place of the meeting, including
9 a general explanation of the matter to be considered, shall be mailed
10 at least 14 days prior to the meeting to any interested party who
11 files a written request with the governmental agency for mailed
12 notice of the meeting on new or increased fees or service charges.
13 Any written request for mailed notices shall be valid for one year
14 from the date on which it is filed unless a renewal request is filed
15 prior to the expiration of the one-year period for which the written
16 request was filed. The legislative body may establish a reasonable
17 annual charge for sending notices based on the estimated cost of
18 providing the service.

19 (B) At least 10 days prior to the meeting, the governmental
20 agency shall make available to the public data that supports the
21 amount of the fee or the increase in the fee.

22 (C) (i) At least 10 days prior to the meeting, the governmental
23 agency shall publish a notice in a newspaper of general circulation
24 in that agency's jurisdiction stating the date, time, and place of the
25 meeting, including a general explanation of the matter to be
26 considered.

27 (ii) Any costs incurred by the governmental agency in
28 conducting the meeting or meetings required by this section may
29 be recovered from fees charged for the services that are the subject
30 of the fee.

31 (iii) For infrastructure projects specifically authorized by this
32 chapter, at least 10 days prior to the meeting, the governmental
33 agency shall publish for four consecutive times, a notice in the
34 newspaper of general circulation in the affected area stating in no
35 smaller than 10-point type a notice specifying the subject of the
36 hearing, the date, time, and place of the meeting, and in at least
37 8-point type a general explanation of the matter to be considered.

38 (D) No governmental agency shall levy a new fee or service
39 charge or increase an existing fee or service charge to an amount
40 that exceeds the estimated cost for which the user fee revenues are

1 dedicated, ~~including a reasonable rate of return on investment,~~
2 pursuant to paragraph (4). Any action by a governmental agency
3 to levy a new fee or service charge or to approve an increase in an
4 existing fee or service charge pursuant to this chapter shall be taken
5 only by ordinance or resolution. The legislative body of a
6 governmental agency shall not delegate the authority to adopt a
7 new fee or service charge, or to increase a fee or service charge.

8 (6) Require that if the legislative body of the governmental
9 agency determines that fees or service charges create revenues in
10 excess of the actual cost for which the user fee revenues are
11 dedicated, ~~including a reasonable rate of return,~~ pursuant to
12 paragraph (4), those revenues shall either be applied to any
13 indebtedness incurred by the private entity or the governmental
14 agency with respect to the project, be paid into a reserve account
15 in order to offset future operation costs, be paid into the appropriate
16 government account, be used to reduce the user fee or service
17 charge creating the excess, or a combination of these sources.

18 (7) If the private entity operates the facility, require the private
19 entity to maintain the facility in good operating condition at all
20 times, including the time the facility reverts to the governmental
21 agency.

22 (8) Preparation by the private entity of an annual audited report
23 accounting for the income received and expenses to operate the
24 facility. The private entity shall make that report available to any
25 member of the public for a cost not to exceed the cost of
26 reproduction of the report.

27 (9) Provision for a buyout of the private entity's capital
28 investment by the governmental entity in the event of termination
29 or default before the end of the lease term.

30 (10) Provision for appropriate indemnity promises between the
31 governmental agency and the private entity.

32 (11) Provision requiring the private entity to maintain insurance
33 with those coverages and in those amounts that the governmental
34 agency deems appropriate.

35 (12) In the event of a dispute between the governmental agency
36 and the private entity, both parties shall be entitled to all available
37 legal or equitable remedies.

38 SEC. 8. Section 5956.7 of the Government Code is amended
39 to read:

5956.7. (a) The governmental agency may exercise any power possessed by it with respect to the development and construction of infrastructure projects pursuant to this chapter. Agreements for the maintenance and operation of services entered into pursuant to this chapter shall provide for full reimbursement for services rendered by the governmental agency in accordance with the terms and conditions specified in the agreement. The governmental agency may provide services for which it is reimbursed with respect to preliminary planning, environmental certification, and preliminary design of the infrastructure projects. The governmental agency may consult with legal, financial, and other consultants in the negotiation and development of the agreement. To the extent existing public utility infrastructure is necessarily required to be modified, relocated, or removed in order for an infrastructure project authorized by this chapter to be constructed, the cost of modification, relocation, or removal of the existing infrastructure shall be borne by the private entity and included as a recoverable capital cost of the project. This cost shall not be construed to include costs of increasing the capacity, or upgrading, or improving the existing public utility infrastructure.

(b) The private entity's responsibility to modify, relocate, or remove existing public utility infrastructure shall not alter any agreements that may be in place between the governmental agency and any public utility regarding projects funded by the governmental agency.

(c) In the event of a dispute regarding the reimbursement required, a private entity may request an audit of the public utility's costs by a mutually acceptable certified public accountant. The result of the audit shall determine the actual costs. If the audit indicates that the public utility's actual costs were less than 95 percent of the cost claimed, the cost of the audit shall be borne by the public utility. If the audit indicates that the public utility's actual costs were 95 percent or more of the cost claimed, the cost of the audit shall be borne by the private entity.

SEC. 9. Section 5956.8 of the Government Code is amended to read:

5956.8. The plans and specifications for each project constructed pursuant to this chapter shall comply with all applicable governmental design standards for that particular infrastructure project. The private entity performing the agreement shall utilize

1 private sector design and construction firms to design and construct
2 the infrastructure facilities. However, a facility subject to this
3 chapter and leased, licensed, or permitted to a private entity shall,
4 during the term of the lease, license, or permit, be deemed to be
5 public property for purposes of identification, maintenance,
6 enforcement of laws, and for purposes of Division 3.6
7 (commencing with Section 810). All construction, alteration,
8 demolition, installation, and repair work pursuant to this chapter
9 shall comply with Chapter 1 (commencing with Section 1720) of
10 Part 7 of Division 2 of the Labor Code.

11 SEC. 10. Section 5956.9 of the Government Code is amended
12 to read:

13 5956.9. In order to use the authority conferred by this chapter
14 to the maximum extent, a governmental agency may use private
15 infrastructure financing pursuant to this chapter as the exclusive
16 funding or revenue source or as a supplemental funding or revenue
17 source with federal or local funds. The governmental agency
18 involved may be a local governmental agency or a combination
19 of local governmental agencies. The governmental agency may
20 work cooperatively with the California Infrastructure and Economic
21 Development Board with regard to the design, construction,
22 operation, and financing of privately financed facilities, but the
23 projects will not be subject to the review or approval of that board.

24 SEC. 11. Section 5956.10 of the Government Code is amended
25 to read:

26 5956.10. Notwithstanding any provision of this chapter, neither
27 the state or any state agency may directly or indirectly use the
28 authority in this chapter, nor may any governmental agency as
29 defined in Section 5956.3, use the authority in this chapter, to
30 design, construct, finance, or operate a state project. For purposes
31 of this section, a state project includes any of the following:

- 32 (a) Toll roads on state highways.
- 33 (b) State water projects.
- 34 (c) State park and recreation projects.
- 35 (d) State financed projects.

36 These limitations shall not prohibit the state, any state agency,
37 or any governmental agency as defined in Section 5956.3, from
38 utilizing authorizations contained in other provisions of law. This
39 section shall not be construed to prohibit a governmental agency

1 from using this chapter to accomplish projects that are not expressly
2 prohibited in this section.

3 SEC. 12. Section 5956.12 is added to the Government Code,
4 to read:

5 5956.12. The governmental agency may determine the validity
6 of any permits, authorizations or approvals, contracts and
7 agreements, user fees, and other actions taken pursuant to this
8 chapter, by initiating a validating proceeding, as provided in
9 Chapter 9 (commencing with Section 860) of Title 10 of Part 2 of
10 the Code of Civil Procedure. The validating action may also be
11 initiated by interested persons as provided in Chapter 9
12 (commencing with Section 860) of Title 10 of Part 2 of the Code
13 of Civil Procedure.

14 ~~SEC. 13. Section 5956.13 is added to the Government Code,~~
15 ~~to read:~~

16 ~~5956.13. If a local governmental agency elects to proceed under~~
17 ~~this chapter, the local governmental agency shall establish and~~
18 ~~enforce for the project a labor compliance program containing the~~
19 ~~requirements outlined in Section 1771.5 of the Labor Code, or it~~
20 ~~shall contract with a third party to operate a labor compliance~~
21 ~~program containing the requirements outlined in Section 1771.5~~
22 ~~of the Labor Code. This requirement shall not apply to any project~~
23 ~~where the governmental agency or private entity has entered into~~
24 ~~any collective bargaining agreement or agreements that bind all~~
25 ~~of the contractors performing work on the project.~~